



**Kam Company Limited v Afrique & another (Civil Suit 49 of 2005)
[2020] KEHC 9223 (KLR) (Commercial and Tax) (17 July 2020) (Judgment)**

Neutral citation: [2020] KEHC 9223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 49 OF 2005
GL NZIOKA, J
JULY 17, 2020**

BETWEEN

KAM COMPANY LIMITED PLAINTIFF

AND

SHELTER AFRIQUE 1ST DEFENDANT

WESTLANDS RESIDENTIAL RESORT LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint dated; 27th January 2005, amended on 25th July 2005 and re- amended on 19th October 2006, seeking for judgment against the Defendants jointly and severally for: -
 - a) An injunction restraining the defendants by themselves, their servants, agents and/or in any way dealing with the suit premises otherwise known as; Land Reference number 2/654;
 - b) General damages for breach of contract by the first defendant;
 - ba) General damages for forceful eviction;
 - c) A declaration that any purported sale agreement of the suit premises between the first and second defendants is null and void and that any such sale be annulled, cancelled on grounds of fraud and illegality and any transfer of title be cancelled;
 - d) An order under section 52 of the Indian Transfer of Property Act (Amendment) Act 1959, that all further registration or change of registration in ownership, leasing, allotment, user, occupation or in any kind or right to title or interest in all that parcel of land known as; LR No.



2/654 Nairobi with any Land Registrar, Government Department and all other registering authorities be and is hereby prohibited;

- e) An order directing the defendants to deliver up to the plaintiff the said documents of the title duly released and discharged from the charge and an order that the defendants forthwith concurs in doing all acts and things and executes all the necessary deeds and documents in order to effectuate the orders aforesaid and that any encumbrance, charge or debenture registered against the property be discharged and/ or expunged;
 - f) General compensation and punitive damages for trespass by the 2nd defendant;
 - g) A declaration that the transfer of; LR No. 2/654 Nairobi to the 2nd defendant is null and void and an order for the cancellation of the said transfer and restoration of the plaintiff as the owner thereof. And the Principal Registrar of titles be directed to effect the changes;
 - h) Compensation for the materials and machines on site at the time of eviction;
 - i) General damages for breach of contract by the 1st defendant;
 - i) A declaration that the amount of money due to the 1st defendant from the plaintiff be set off against the plaintiff's claim;
 - j) Damages for alterations made on the suit premises by the second defendants;
 - k) A declaration that the changes and alterations in the structure of the suit premises be declared illegal and unlawful and the same be removed forthwith;
 - l) A declaration that the 1st defendant is not entitled to interests or penalty payment with effect from; 1st May 2004;
 - m) Costs of the suit, and
 - n) Interest on (b), (ba), (f), (h), (i) & (m).
2. The Plaintiff avers that, at all material time to this suit, it was and is still the registered owner of all that, leasehold piece of land situated at; Kilimani area Nairobi and more particularly known as; LR No. 2/654 (herein "the suit property"). On the other part, the 1st Defendant is described as a company for, Habitat and Housing in Africa, engaged in development of; Houses and Financing Housing Projects.
3. That, on or about January 2001, the Plaintiff approached the 1st Defendant for a facility of; Kshs.29, 000,000, to develop twenty-four (24) apartments and related infrastructure on the suit property. The loan was to be disbursed in stages depending on the level of development and repayable in a period of three (3) years from the date of the final disbursement. Pursuant to the grant of the facility, the Plaintiff mortgaged the suit premises to secure the re-payment of the loan.
4. That, prior to applying and obtaining the facility, the Plaintiff had injected into the project a substantial sum of; over Kshs.50, 000.000. Therefore, the facility was to facilitate completion thereof. That, on the 17th May 2001, the Plaintiff and the 1st Defendant agreed to open an escrow account with; the Standard Chartered Bank Limited, where the Plaintiff would deposit all the sale and rental proceeds.
5. However, the Plaintiff avers that, the 1st Defendant breached the terms of the mortgage by the failing to disburse the entire loan amount and only disbursed a sum of; Ksh. 22,000,000, leaving a balance of; Ksh. 7,000,000, to be disbursed later. As a consequence, thereof; the Plaintiff only completed 85% of the project.



6. That, despite the aforesaid breach, the 1st Defendant has persistently called for their money and purports to have sold the suit premises by way of public auction on; 9th March 2005, thereby denying the Plaintiff the right to redeem the suit property. The Plaintiff argues that, the threat of intended auction of the suit property is premature, as the Defendant has not disbursed the final part of the loan, leaving 15% of the project incomplete.
7. Further, the 1st Defendant has frustrated its effort to redeem the loan account and/or finish the project by; refusing to forward to the Plaintiff and/or the prospective buyer (s) statements of accounts, a copy of the title document and other completion documents. Further, the negotiations on redemption of the property had been concluded and what remained was the figure from 1st Defendant to enable payment to be made by the prospective buyers.
8. The Plaintiff avers that, it has sued the 2nd Defendant due to its complicity and collusion with the 1st Defendant to defraud it of the suit property. That, the sale to the 2nd Defendant was pre-arranged, and that the property was fraudulently sold as far as back on 22nd September 2004, when the 2nd Defendant showed interest in the purchase thereof even before the auction.
9. Furthermore, the auction was not due and indeed no auction proceeded on 9th March 2005, as confirmed by the Auctioneer's letter of the even date. Additionally, the purported sale took place when the matter was on-going in Court.
10. The Plaintiff also avers that, the suit property was sold at a throw away price of; Ksh.34, 000,000, which was below the reserve price of; Kshs 42,000,000 and/or forced sale value. That, the value of the complete project is estimated at; Ksh.104, 000,000. Additionally, N.W Realite Limited, carried out a valuation on; 8th March 2005, a day before the alleged auction and returned a value of; Ksh.60, 000,000, which in any case was an undervalue.
11. Further, the 2nd Defendant forcibly and without any notice or court order evicted the Plaintiff from the construction site and removed its material from the site causing the Plaintiff loss. That, the materials which the 2nd Defendant removed from the site and/or interfered with includes:
 - a. Electrical materials, PVC and ceramic tiles, wood parquet, paints, sanitary and plumbing items, joinery materials, sand and stones worth; Kshs. 3,000,000;
 - b. Site office, desks, chairs, filling cabinets, design drawings, desktop, computer with software and project files valued at; Ksh.1, 315,000; and
 - c. Machines and equipment, surveying equipment, concrete mixture, block making machine and water meter valued at; Ksh.950, 000.
12. Similarly, the 2nd Defendant has embarked on massive construction works; thereby changing the concept of the suit property without the Plaintiff's consent and approval.
13. Finally, it is averred that, the 1st Defendant did not give any valid statutory notice of the intention to realize the security; as by law required and that, the mortgage created is not valid in law. As such the 1st Defendant cannot have any recourse under it.
14. However, the 1st Defendant filed an amended defence and counter claim dated 18th June 2007 and denied each and every allegation in the re-amended plaint, save for the fact that, the total estimated costs of project was; Kshs. 70,458,000. That, the Plaintiff agreed to partly finance the project and was to secure the provision of sufficient additional funds to complete it.



15. Further, that the loan was to be disbursed in stages depending on the level of development of the project as assessed by the 1st Defendant and was to be done on either re-imbursement basis or as per the Architect's certificates. However, the Plaintiff failed to secure the additional funds necessary to complete the project and service the loan as required by the loan agreement executed by the parties dated; 19th January 2001.
16. Further, the loan was repayable within seventeen (17) months from the date of execution of the loan agreement. The first disbursement was effected on; 4th April 2001 and therefore the first repayment was due on; 15th June 2001, with subsequent repayments on; 15th December 2002, 15th June 2003 and 15th December 2003, plus interest thereon, from the date of disbursement. That, due to the Plaintiff's default to honour the agreement, the 1st Defendant is entitled to demand payment of the loan.
17. The 1st Defendant further argued that, it sold the suit premises to the 2nd Defendant on the 9th March 2005, in a public auction, pursuant to its right under the mortgage dated; 21st Februaryth September 2002. That, under the mortgage and/or loan documents, it was under no obligation, to assist the Plaintiff in redeeming the suit property, while the Plaintiff was in default and after service of the statutory notice dated; 11th September 2003.
2001 and the further mortgage dated; 10
18. Further, the Plaintiff has been in arrears for a very long time, without making efforts to liquidate the amount as interest continued to accrue at the contractual rate of; 19% p.a. That, the outstanding loan as at; 31st December 2004, was a sum of; Kshs, 43,159,714.42 and on 9th March 2005, the suit property was sold at; Kshs. 34,000,000, thus leaving a balance of; Kshs. 9,159,714,42 due and owing.
19. The 1st Defendant prayed that, the Plaintiff's suit be dismissed and judgment be entered against the Plaintiff for: -
 - a. A sum of KShs.9, 159,7 14.42 together with interest accruing thereon at 19% per annum from 1st January 2005;
 - b. Interest on (a) at 19% p. a. from 1st. January 2005 till payment in full;
 - c. Costs of this suit and of the counter-claim and interest thereon at court rates;
 - d. Any other or further relief as this court may deem fit and just to grant.
20. The 2nd Defendant filed an amended statement dated; 18th June 2007, and averred that, the Plaintiff's re-amended plaint does not disclose any cause of action against it as the purchaser of the suit property, nor does the Plaintiff have any enforceable equitable right in the suit property, in view of the transfer thereof in its favour, on 27th May 2005.
21. That, it purchased the suit property on; 9th March 2005, in a public auction and not through a private treaty as alleged. Further, it did not have any knowledge that, there was a pending suit in court in respect of the property nor was it obliged to find out the same. Furthermore, it acted in good faith in purchasing the suit property and was under no duty in law to inquire whether the Auctioneer Rules had been complied with in selling the suit property.
22. That, being the highest bidder at; Kshs. 34,000,000, it paid a down payment in the sum of; Kshs. 9,000,000, at the fall of the hammer and having paid the due consideration for the property, any such equitable interest that the Plaintiff had in the suit property was extinguished upon the sale and transfer of the property to it pursuant to the provisions of; section 69B of the Transfer of Property Act.



23. As a result; it is the absolute and indefeasible owner of the suit property and its title cannot be impeached. Further, it has since taken possession thereof and made substantial improvements thereon and therefore, the Plaintiff's remedy, if any, lies in damages as against the 1st Defendant.
24. The 2nd Defendant argued that, the Plaintiff's claim of fraud is misconceived and does not lie as the Auctioneer who carried out the public auction was not enjoined in the suit. Additionally, any irregularities and omissions in conducting the auction, if any, as the Plaintiff may prove against the Auctioneer, cannot be grounds for setting aside the sale of the suit property. That the Plaintiff's remedy, if any, will lie in damages against the Auctioneer, in view of the provisions of; section 26 of the [Auctioneers Act](#), 1995.
25. Finally, that there were no building materials on the suit property and neither did he utilize the same. That, the suit is misconceived, frivolous, vexatious and discloses no reasonable cause of action, and should be dismissed with costs.
26. The suit proceeded to a full hearing. The Plaintiff's case was supported by the evidence of its Managing Director; Engineer Peter Kamau Ikigu, who stated that, he is a member of; the Institute of Engineers of Kenya, Tanzania, Engineers and Technologists (UK) and the International Network of; Small Hydro Power (China). He relied on his statement dated 14th March 2012 and the documents filed in court dated; on 27th February 2012 and 20th November 2015, and literally reiterated the averments in the re-amended plaint.
27. However, in a nutshell he testified that, he holds a freehold interest in the suit property and had leased it to the Plaintiff for a period of eleven (11) years, with effect from, 1997 to 2008, pursuant to a Lease Agreement dated; 6th May 1997 and registered in Government Lands Registry at Nairobi in Volume N64 Folio 58/1 File No 20248. That, pursuant to the resolution passed by the Plaintiff's Board of Directors in the month of; November 2000, the Plaintiff resolved to borrow; Kshs 22,000,000 from the 1st Defendant and subsequently a loan agreement dated 19th January 2001, was executed. The facility was secured vide a mortgage instrument dated; 21st February 2001, signed by both parties thereto.
28. Subsequently, the Plaintiff borrowed an additional sum of; Kshs. 7,000,000 from the 1st Defendant and an addendum was drawn and executed on 1st August 2002. A further mortgage instrument dated; 10th September 2002, was registered by the 1st Defendant at the Government Land Registry Nairobi on; 11th September 2002. However, for no apparent reason, the 1st Defendant disbursed only Kshs 4,000,000 of the subsequent amount, leaving a balance of; Kshs 3,000,000.
29. That, upon demand of repayment of the loan amount, the parties engaged in a series of meetings and agreed that, the Plaintiff would sell off the apartments practically finished in Block A and raise the money to pay off the loan amount. The Plaintiff engaged; M/s Villa Care Ltd, to market the property and by a letter dated; 21st January 2003, the Plaintiff was advised that, it needed to complete certain works, inter alia; the drive way to enable proper uptake of the property. A quotation was received from; M/s Bamburi Special Products Ltd, for laying of paving blocks. The Plaintiff then sought for additional funds from the 1st Defendant and the parties agreed that, the 1st Defendant would finance the same but it did not do so.
30. That, later the parties agreed that the entire project be completed and sold. To that effect, the projected sale income was a sum of; Kshs 88,400,000. In the meantime, the Plaintiff approached, Housing Finance Company of Kenya and M/s Savings and Loan Kenya Limited to take over the facility from the 1st Defendant. M/s Savings & Loan Kenya Limited responded positively.



31. That, the Plaintiff wrote to the 1st Defendant on 12th August 2003, seeking for a full detailed statement of what was owing, however, the 1st Defendant through the firm of; M/s Waruhiu K'owade & Nganga Advocates, instead issued a statutory notice dated; 11th September 2003, to realize the security. By a letter dated 9th October 2003, the Plaintiff requested the 1st Defendant for a meeting on; 12th October 2003, to discuss the purported statutory notice, but the 1st Defendant did not respond to the letter. The Plaintiff wrote a reminder on; 1st December 2003, but did not receive any response. Instead, the 1st Defendant advised the Plaintiff to consider the option of selling the whole project and promised to facilitate the sale.
32. That, the Plaintiff engaged a number of, Estate Agents inter alia; Pinnacle projects Ltd and Breakthrough Services Ltd, to sell the suit property. However, the sale process was frustrated due to lack of co-operation from the 1st Defendant, which declined to give crucial information to the Agents and prospective purchasers.
33. On 19th October 2004, the parties agreed in a meeting that, the 1st Defendant would facilitate the sale by giving rebate on interest and penalty for the year 2004 and an accurate up to date statements of accounts including all necessary information pertaining to the sale and/or copies of the title documents. Subsequently, the Plaintiff executed sales agreement with a prospective purchaser subject to the approval by the 1st Defendant.
34. Pursuant thereto, the Plaintiff's lawyers forwarded the draft sale agreement to the purchaser's lawyers on; 11th November 2004 and they responded on; 24th November 2004, seeking for clarifications of certain clauses and a written assurance by the 1st Defendant, that, it had no objection and was ready and willing to facilitate completion on the terms offered but there was no response to the letter.
35. That, Trans-National Bank Limited was financing the intended purchasers and was ready to proceed with the transaction but needed a statement of the amount due to the 1st Defendant. That the Plaintiff's lawyers wrote to the 1st Defendant a letter dated 23rd March 2005, seeking instructions on how the funds were to be disbursed, but there was no response.
36. On 1st April 2005, the Plaintiff's lawyers wrote to the 1st Defendant lawyers seeking for response to their correspondence. On 1st April 2005, the Advocates of; Trans-National Bank Ltd, wrote to the 1st Defendant's lawyers seeking to know how much money was due to the 1st Defendant for them to issue a professional undertaking. The 1st Defendant did not respond. This letter was followed by a reminder letter dated 20th April 2005. There was no response.
37. On 22nd April 2005, the 1st Defendant's lawyers wrote to the lawyers of; Trans National Bank Limited, informing them that the property had been sold by public auction which information was within the knowledge of the Plaintiff and that the equity of redemption had been extinguished. The Plaintiff avers that; this was a sign that, the 1st Defendant was out to frustrate its efforts to repay the debt.
38. In cross examination the witness stated that, clause 7 of the agreement provided for the terms of repayment of the loan. That the loan and interest was to be repaid over a period of three (3) years but this did not happen. Further, the addendum executed by the parties' states that, the whole amount of the loan was not disbursed due to the non-repayment of interest charges coupled with the lack of evidence on how the balance of financing would be sourced.
39. The witness admitted that, by the time the property was sold, the Plaintiff had not paid the debt of; Kshs 33,000,000. He confirmed receipt of the statutory notice; but not any demand letter. He maintained that, the 1st Defendant never issued the Plaintiff with the statements of accounts.



40. In further, cross examination by the 2nd Defendant, the witness confirmed that, the Plaintiff owed the 1st Defendant a sum of; Kshs 26,633,900, as at 31st December 2004, but insisted that, the property was sold at an undervalue of; Kshs 34,000,000, at a differential of; Kshs 8,000,000 and if that figure is accounted for and/or deducted from the Kshs 26,633,900, then the balance owed by the Plaintiff would be; Kshs 18,633,900. He further confirmed that, the property is currently registered in the name of the 2nd Defendant, which is in possession thereof from 1st June 2005.
41. However, in re-examination, the witness reiterated that the loan for Kshs 7,000,000 was not disbursed in full. That, it was to take care of additional costs to complete the project and as a consequence, it put the Plaintiff into a spin, as it had to sell the whole project. That, although what was conveyed to the 2nd Defendant was a leasehold title, the lease was never surrendered and a conveyance can only be on a freehold title. He maintained that he never received a statement on how the proceeds of the sale of the suit property were utilized.
42. The 1st Defendant's case was supported by the evidence of Yekini Olayanju; who relied on his statement filed in court on 6th March 2018; reiterating the pleadings. He testified in a nutshell, that, the Plaintiff failed to secure the necessary funds to complete the project and service the loan as per the terms of the loan agreement. Consequently, pursuant to the loan agreement the 1st Defendant cancelled further disbursements and sent demand letters for immediate payment of the loan arrears.
43. That, the Plaintiff was issued with a statutory notice dated 11th September 2003, by M/s Waruhiu, K'owade & Nganga and sought for indulgence on the basis that, it was selling a property in Karen to one, David Hinga for Kshs 55,000,000 and the proceeds would be used to liquidate the outstanding loan. This did not materialize. The Plaintiff later intimated that, it was to sell the property to a group of; Shah Brothers and later identified another prospective buyer who had offered to buy the property at; Kshs 60,000,000. That was also not honoured.
44. That, on 19th October 2004, the Plaintiff informed the 1st Defendant in a meeting of the possible sale of the mortgaged property to one, K. Sambu at Kshs 54,000,000. The sale was approved but never concluded. The Plaintiffs also proposed to sell the property to; Topsy Company. This sale too did not materialize and consequently the 1st Defendant through its external lawyers proposed to the Plaintiff its willingness to take over the project, complete it and sell the necessary number of units sufficient to recover its debt and leave the rest to the Plaintiff. The Plaintiff declined this offer.
45. The 1st Defendant denied the allegations that, the Plaintiff requested for a copy of the title documents in order to kick start any of the purported sales and it declined to give the same. The witness testified that, as at 31st December 2004, the loan had accumulated to; Kshs 43,159,714.42. That the 1st Defendant carried out a valuation of the property through; M/s Realite Limited who came up with a value of; Kshs 50,000,000 and forced value of Kshs 35,000,000. Subsequently, the property was auctioned on; 9th March 2005 at Kshs 34,000,000 to the 2nd Defendant as the highest bidder.
46. However, at the time of sale and after the auction, the outstanding debt of; Kshs 45,159,714, was not fully repaid, and a balance of Kshs 9,159,714.42, remained which the 1st Defendant is demanding in the counter claim. The 1st Defendant denied that there was any fraud or collusion in the auction sale. That the sale was also sanctioned by the court when it dismissed the Plaintiff's injunction application in this suit.
47. In cross examination by the Plaintiff, the witness stated that the statement of the loan balance of; Kshs 26,683,900, as at 26th January 2005, was sent to the Plaintiff for confirmation two months to the date of the auction. That, at the time of auction, the outstanding sum was; Kshs 43,159,714 and at, as 1st



July 2005, the amount due and outstanding loan principal, interest and penalties was; Kshs 25,000,000 which was paid vide cheque number 935282 and a receipt voucher number 203011, issued on that date. On 27th October 2005, a further sum of; Kshs 6,960,984 was paid vide cheque number 014749 and receipt voucher number 203097 issued leaving the amount claimed in the counter claim.

48. In re-examination he stated that, according to the mortgage document dated 21st February 2001, the First and the Second Schedule represents two properties; LR No 2/645 original No. 2/225/2, held by the 1st Mortgagor as Estate in Fee Simple and the second property; LR. No 2/645; held by the 2nd Mortgagor as Leasehold interest. Therefore, it is one and the same property held in different interests. He confirmed that, he did not attend the auction and had no information on the bidders.
49. He further confirmed that, the 1st Defendant's bundle of documents starting from page 115.0, 105.76 to page to 105.38, show the principal sum and the interest payable. However, he did not know why the auctioneer had a different date on the certificate of sale indicating 2004 when the auction was held on 9th March 2005. To him it is an error.
50. The second Defendant's case was supported by the evidence of its director; Stanley Kinyanjui who adopted and relied on his statement and reiterated the averments in its defence. In a nutshell, he testified that, he was the highest bidder for the property at Kshs 34,000,000 and paid a deposit of Kshs 9,000,000 by bankers cheque number 0022 at the fall of the hammer and the balance of Kshs 25,000,000 on 13th June 2005. On 27th May 2005 the property was transferred to the 2nd Defendant and it acquired a freehold interest in the suit property.
51. In cross examination by the Plaintiff, he confirmed that the saw the advert in the dailies but did not get in touch with the Auctioneer. That there were more than 10 bidders on the day of the auction conducted between 11.00 a.m and 12.00 noon. That, after the fall of the hammer, he went to the bank and got a bankers cheque and paid the same.
52. Further, according to the Auctioneers Rules, he was to pay 25% of the price but paid Kshs 9,000,000 which is more than 25% and paid the balance of the purchase price as soon as the property was transferred on; 13th June 2005. That, the bank had given a bank guarantee to the Advocates and the 2nd Defendant took possession of the property after the transfer but did not inform the caretaker in writing that, they were taking over nor did they get a court order for that.
53. He confirmed that the property the 2nd Defendant bought at the auction was as stated in the conveyance dated; 19th May 2005 registered in volume N 64 Folio 58/4 and File No 20245 registered on 27th May 2005.
54. In re-examination, he stated that the Plaintiff was not a party to the Memorandum of Sale dated 9th March 2005. That, the interest conveyed was of; both 1st and 2nd Mortgagors. In addition, the 2nd Defendant was not a party to the application by the Plaintiff made on; 28th January 2005, to stop the sale but was later joined in the suit by the Plaintiff after he had taken possession of the suit property.
55. I have considered the evidence adduced and the submissions and I find that, the following issues have arisen for determination:
 - a. Whether there was a valid agreement between the plaintiff and the 1st defendant in respect to the loan facility and/or valid mortgage agreement between the mortgagor and the 1st defendant;
 - b. If the answer to (a) above is in the affirmative, what were the terms and conditions of the contract;



- c. Whether either party breached the contract;
 - d. Whether the 1st defendant properly and lawfully exercised the statutory power of sale;
 - e. Whether the 2nd defendant received a clean title to the property;
 - f. Whether either party has proved its respective claim; and
 - g. Who will bear the costs?
56. On the first issue I find that, there is no dispute that the 1st Defendant and the Plaintiff entered into a loan agreement dated; 19th January 2001, in which it was agreed that the 1st Defendant would advance to the Plaintiff a loan facility of; Kshs 22,000,000. The loan agreement is signed by the Plaintiff's Managing Director and Company Secretary and sealed with the Company seal.
57. As regards the second issue, there is also no dispute the Plaintiff is the registered lessee of; the suit property herein, as evidenced by the lease agreement dated; 6th May 1997 and that, the suit property was used to secure the subject credit facility herein. The mortgage was executed by; Peter Kamau Ikigu, who is described as the first Mortgagor and the Plaintiff, described as the second Mortgagor.
58. It is noteworthy that, the first Mortgagor executed the mortgage instrument despite the fact that, the loan was advanced to the Plaintiff alone, because the first Mortgagor is the registered as proprietor of the freehold interest as described in the first schedule, whereas the second Mortgagor is the registered as a proprietor of the leasehold interest in the land as described in the second schedule. I have looked at both schedules; they relate to the same subject land; LR No2/654 (original 2/225/2).
59. However, the difference is that, the property described in the first schedule relates to; a conveyance dated 26th July 1988; between Fredrick Owour Tago and Jessica Akinyi Tago, as vendors and Peter Kamau Ikigu, as the purchaser, wherein the purchaser acquired the freehold interest. The second property relates to a lease dated 6th March 1997, between Peter Kamau Ikigu as the lessor and KAM Company Ltd as the lessee in which the Plaintiff acquired a leasehold interest for eleven years from 1997 to 2008.
60. Be that as it were, the first mortgagor may also have signed the mortgage instrument, in view of the fact that, the lease may have contained some restrictions "absolute or conditional on the lessor's consent" on mortgaging or assigning the lease. In the given circumstances a bank will not accept the lease as security unless the lessor's consent is obtained. This is informed by the fact that, a problem may arise later if the mortgagee wishes to exercise its power of sale, which will require an assignment of the lease to the purchaser. Hence the need to have obtained the lessors consent.
61. Be that as it may, the Plaintiff argues that, the mortgage instrument is void and unenforceable, as the mortgagors' signatures on the document was not attested to by an Advocate, contrary to the provisions of; section 69(4) of the ITPA, and neither did the Advocate explain to the Plaintiff the legal effect of the instrument signed.
62. However, the 1st Defendant responded by submitting that, a closer look at the mortgage instrument show that, the mortgage dated; 21st February 2001, was executed by, Peter Kamau Ikingu on his part as the first Mortgagor and also on his part as a director of the second mortgagor; the Plaintiff Company.
63. That, even though, the execution of the mortgage by Peter Kamau Ikingu, on his part as first mortgagor was not attested to, it was none the less witnessed by, Raphael K. Ngethe Advocate. Further the execution of the mortgage by; Peter Kamau Ikingu, on his part as a director of the second mortgagor,



- was duly attested to by; Raphael K. Ng'ethe Advocate who certified that, he had explained to him the effect of; section 69(1) of the Indian Transfer of Property Act 1882.
64. The 1st Defendant therefore submitted, the first Mortgagor cannot rely on the argument that, he was not explained to the effect of section 69(1) of ITPA, to invalidate the mortgage as this would be inequitable. Further, the validity of the mortgage dated ;10th September 2002, has not been challenged.
 65. The 1st Defendant relied on the case of; Giro Commercial Bank Limited vs Econ Construction & Engineering Limited & Another [2014] eKLR , where the court held that; in a case where a transaction has been entered into; money has been disbursed; the instrument in question is sealed with the seal of the company; the seal is authenticated by two directors; there is a certificate by an advocate confirming that the company is fully aware of the effect of execution of the instrument; and that the company does not contend that, it did not sign the instrument or that it did not know the effect of signing, it would be a monumental injustice to hold that the instrument is invalid. That, a court, should be conscious of the principles that underpin the administration of justice under Article 159 of *the Constitution*.
 66. Having considered the arguments of both parties, I find and hold that, the first Mortgagor having signed the mortgage instrument in dual capacity; in his personal capacity and as a director and/or on behalf of the Plaintiff, when the purport thereof was explained to him, he already had adequate knowledge explained to him in his capacity, as the second mortgagor and failure to have been given the same explanation in his personal capacity is not prejudicial to him.
 67. Finally, it is not in dispute that, the Plaintiff derived a benefit in terms of the loan facility disbursed, in consideration of the second mortgage instrument. As such the entire transaction cannot be prejudicial to him, although as a matter of caution, mortgagee ought to have been more conscious. Be that as it were, I hold that the mortgage instrument is not defective and/or null and void.
 68. The next issue is whether the credit facility was advanced. It is also not in dispute that, pursuant to the resolution passed by the Plaintiff's Board of Directors in the meeting held on; 17th November 2000, the Plaintiff applied for a loan of Kshs 29,000,000 from the 1st Defendant. However, I note from the copy of the resolution produced, it was resolved that, the company applies for a loan of; Kshs 22,000,000. Subsequently, the 1st Defendant advanced to the Plaintiff Kshs 22,000,000 vide the loan agreement dated; 19th January 2001. The Plaintiff has admitted the advance.
 69. The next issue relates to whether, there was default in repayment of the loan facility The Plaintiff does not deny that, it did not make payments as agreed. Indeed, on 11th September 2003, the 1st Defendant through the firm of; Waruhiu K'owade & Nganga Advocates wrote to; Peter Kamau Ikigu, demanding a sum of; Kshs 32,655,496.44, as at 2nd September 2003. The Plaintiff while acknowledging the letter, did not expressly dispute the sum but sought for detailed statements of accounts and vide their letter of 9th October 2003, questioned the interest rate chargeable.
 70. In a letter dated 9th October 2004, Mr Ikigu sought for a meeting with the 1st Defendant to discuss of the sale of the apartments and "complete the bad debt repayment". In a letter dated; 23rd April 2004, the Plaintiff sought for indulgence to sell one of the directors' properties in Karen and/or sell the Apartments to two prospective purchasers' with the hope that they would clear the outstanding debt as soon as possible.
 71. By a letter dated 31st May 2004 the Plaintiff's Advocates informed the 1st Defendant s Advocates that, they had instructions to sell the project in order to clear the mortgage debt and that, they had found a buyer and were negotiating the price. They sought that the 1st Defendant holds at bay any intended



- action. I find that, as a result of the aforesaid, it is clear that the plaintiff was in default and the 1st Defendant's statutory power of sale had arisen.
72. That leads to the subject sale. The Plaintiff faults the sale on several grounds; lack of pre-requisite statutory notices, sale during the subsistence of a court case, sale of a non-existence interest, undervalue, collusion and unlawful transfer of the suit property to the 2nd Defendant. That, there was complicity and collusion between the Defendants to defraud him and that, the sale of the property proceeded under section 69 of ITPA, which was not applicable.
 73. Further, no auction took place. That the Plaintiff sent two people to the auction, Mr. Stephen and Mr. Protas, who informed him that, there was no auction on the material date. That, Mr. Protas swore an affidavit dated; 24th June 2005, to the effect that, he was instructed by the PW 1, to attend the auction which was to be held at 11. 00a.m at the offices of; M/s Marchet Auctioneers. That, he waited at the offices until 5.00p.m., but the auction was not held on that day.
 74. Furthermore, the certificate of sale from; M/s Marchet Auctioneers dated 9th March 2005, shows that, the public auction took place on the 22nd September 2004 and the highest bidder was; M/s Westlands Residential Resort Ltd. Additionally, there is no attendance list of the people who attended the auction on 9th March 2005.
 75. However, the 1st Defendant in response avers that, it served a statutory notice dated; 11th September 2003, while the 2nd Defendant denied allegation of complicity and collusion as alleged by the Plaintiff.
 76. Having considered the entire evidence, I find that, the 1st Defendant has produced evidence to show that, the Plaintiff was served with a statutory notice of sale, a notification of sale notice and a redemption notice. The letter of; 11th September 2003, served as statutory demand of payment of the outstanding sum, within three (3) months or the 1st Defendant proceeds with the sale of the security.
 77. By a letter dated 11th May 2004, the 1st Defendant informed the Plaintiff that, it had not complied with the statutory notice issued and therefore it will realize its security either by public auction or private treaty. By a letter dated 5th January 2005, Marchet Auctioneers (K) Ltd, served both Mortgagors with a forty-five (45) days notification of sale and redemption notice of the even date of a similar period, pursuant to Rule 15(d) of the Auctioneers Rules 1997. Therefore, the issue of lack of service of a statutory notices does not lie. Further, the Plaintiff's application for injunction to stop the sale, was not successful and as much as the sale was allegedly conducted on the same date the ruling was delivered, there was no court order restraining the sale.
 78. On whether the sale took place on the material date, I find that, there is evidence that the suit property was advertised as stated herein. There is no evidence the advertisement was cancelled. There is evidence of payment of; Kshs 9,000,000 made on that day of the sale and subsequent payments made, on and after the 9th March 2005. The evidence of advertisement of the property for sale, and payments in the year 2005, does not support the Sale in the year 2004.
 79. Indeed, for the Plaintiff's witness to have send an emissary to the auction, he must have seen the advertisement. Further the application for injunction order was filed after the advertisement for sale of the suit property. Finally, the person who informed the Plaintiff that, there was no sale, did not testify, yet he was critical to confirm that, there was no sale. His averments remain hearsay Therefore for all intend and purpose, taking into account the circumstances of this case, I arrive at the conclusion that, there was a sale on; 9th March 2005.
 80. On the issue of undervalue, the Plaintiff argues that, at the time of borrowing the money, the value of the property in; January 2001, was Kshs 55,200,000, before completion and Kshs. 70,500,000 after



- completion, and at the time of the sale, the suit property was valued at; Kshs 64,000,000, as incomplete and Kshs 140,000,000 when completed, as per the report of; Dantu Valuers. That, the current open market value would be between; Kshs 250,000,000 and 300,000,000.
81. However, I note, there is a report by Realite Ltd dated; 4th March 2004, which gave the open market value as; Kshs 50,000,000 and forced sale value as; Kshs 35,000,000. There is also a valuation report by; Gimco Ltd dated 22nd July 2004, which states that, the open market value of the unencumbered freehold interest in the suit property “in its present status could be stated in the sum of; Kshs Sixty-one million, one hundred and seventy thousand (Kshs 61,170,000.) On 8th March 2005, Realite Ltd gave the open market value of the property at; Kshs 60,000,000 and forced sale value at Kshs 42,000,000.
 82. It is evident from these valuations that the highest open market value is Kshs 61,000,000 and the lowest Kshs 50,000,000, while the highest forced sale value is Kshs 42,000,000 and the lowest was Kshs 35,000,000. However, what is curious is the fact that; the 1st Defendant conducted a valuation of the property a day before the auction when the property had been advertised for sale.
 83. It suffices to note that, Section 11(1) (b) (x) of the [Auctioneers Act](#) provides that, a court warrant or a letter of instruction shall include; the reserve price for each separate parcel of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.
 84. Be that as it were, even if the court were to uphold that valuation, there has to be an explanation as to why the property was sold at Kshs. 34,000,000, when the report relied on indicates that, the forced sale value was; Kshs. 42,000,000.
 85. Furthermore, it is noteworthy that, none of the valuers gave evidence to assist the court understand what informed the values given in their respective reports. Similarly, the valuation by the Plaintiff did not indicate the forced sale.
 86. My findings on these valuations is that, the acceptable valuation in the given circumstances is one of; 8th March 2005, which should have guided the sale of the property on 9th March 2005. The market value as indicated therein is Kshs. 42, 000,000. The property was sold at Kshs. 34,000,000. Was the sale at a throw away price? I shall revert back to this issue.
 87. The other issue raised in relation to the sale and extremely relevant is the allegations that, the 1st Defendant was so intent and intentionally frustrated the Plaintiff's efforts to exercise its right of redemption. Similarly, it is alleged that, there was collusion, and/or fraud in the sale of the suit property.
 88. In that regard, I have seen a number of letters dated; 10th January 2005 in relation to the sale agreement with Topsy Company Limited, and a series of letters from Triple OK Advocates, within the dates of; 18th March 2005 to 9th March 2005, relating to a sale the suit property. Upon reading these letters, two things come out clearly. First and foremost, other than the letter dated; 10th January 2005, all those letters relates to; a period of; 10th March 2005 to the 9th May 2005. If the sale that took place on; 9th March 2005 then all these correspondences were post that period of sale. Secondly, it is evident that, the 1st defendant did not respond to these letters at all, and therefore it not in vain when the Plaintiff faults the 1st Defendant's conduct.
 89. Be that as it were, another issue arose as which property was sold. Apparently, the Plaintiff's witness held a freehold interest in the suit property and the plaintiff held a leasehold interest for eleven (11) years therein. The Plaintiff argues that, the sale did not affect the freehold interest at all. Further, there is no indication in the relevant land registries, that indeed the freehold interest was disposed of, yet the 1st Defendant purports to have transferred the entire property to the 2nd Defendant and by extension transferred the freehold and the leasehold at the same time.



90. I have considered the mortgage instrument that was executed by the parties on; 21st February 2001, and in particular, clause (a), (b) and (d), which states as follows: -

Clause (a) states as follows:

“the first mortgagor is registered as the proprietor of freehold interest in the land described in the First Schedule hereto together with the buildings, additions and improvements from time to time from part of the land together with the premises. The second mortgagor is registered as the proprietor of the leasehold interest in the land described in the Second Schedule together with the buildings, fixtures, additions and improvements from time to time”

Clause (c) states that, “by a loan agreement dated; 19th day of January made between the second mortgagor...” and

Clause (d) provides that “the first mortgagor, and the second mortgagor (herein collectively referred to as “mortgagor”) ...”.

Clause 4 further states that, “the first mortgagor as beneficial owner, HEREBY GRANTS AND CONVEYS....and the second mortgagor grants and assigns...”

91. I also note that, at paragraph 3 of the re-amended plaint, it is averred as follows:

“at all material times, the plaintiff is the registered proprietor of all that leasehold property situate at Kilimani area and more particularly known as L.R. Number 2/654.”

92. As already observed the mortgage instrument was signed by two parties, being Peter Kamau Ikigu and the Plaintiff. They are described as first and second mortgagors. It is not by the Plaintiff alone. The question is, why Peter was signing this mortgage instrument in the personal capacity and for the Plaintiff?

93. In my considered opinion, the Plaintiff’s witness conveyed, and at the same time, assigned the same property to the 1st Defendant. That is the same property described in the mortgage instrument, sold and transferred to the 2nd Defendant.

94. I shall revert to the issue of whether property was sold at a throw-away price. I have considered all the documents that were given to the court including the agreements between the Plaintiff and Third parties who showed interest in the property and what offers were made by them, alongside the three valuations. Having held that, the guiding valuation is the valuation of; 8th March 2005, then, the sale price of; Kshs. 34,000,000 against a valuation of Kshs. 42,000,000 was not viable, as the true market price for the suit property.

95. It is clearly understood in law and practice that; the mortgagee has a duty towards the mortgagor to sell the property at the true market value. This is because, the mortgagee owes the owner of the property and any other party that may have subsequently acquired an interest in the property, including second mortgagee and any guarantors, the duty to get the best price.

96. In the matter herein, the Auctioneer indicates in the statutory notification notice and also the parties attending the auction that the open market sum for the suit property, is Kshs. 50,000,000. In the letter written by the Auctioneer dated, 9th March, 2005, he indicates a fairly low crowd turned up for the auction. From my reading of the letter, it is clear that he pushed the bidders hard and managed to get a bid of Kshs. 34,000,000. Apparently, he consulted his client and the bid was confirmed. The



- question is: Did this property have to be sold on that day? Did it have to be sold for that price of; Kshs, 34,000,000.
97. The next issue is whether in the given circumstances, should the sale be declared null and void, voidable or unenforceable. My answer is in the negative because of the following. First, the Plaintiff has conceded it was in arrears, therefore the 1st Defendant's statutory power of sale had arisen and/or was lawful. Secondly, the challenges or shortcomings (if any) with the sale have nothing to do with the 2nd Defendant. They have everything to do with the 1st Defendant and its agent, the Auctioneer. The 2nd Defendant cannot be held to have been privy to the conduct of the same and neither was the Auctioneer made a party to this suit.
 98. I find that the failure to realize the true price does not render the sale invalid. I equally hold that, if there is any recourse available to the Plaintiff, then that recourse is found in an award of damages. Finally, I find no evidence to support the allegation of fraud or collusion between the Defendants as alleged.
 99. The next issue to consider is whether the prayers sought should be granted. Pursuant to the aforesaid, the prayer for an order declaring the sale as having been null and void, is declined
 100. Secondly the 2nd Defendant becomes the rightful owner of the property at the conclusion of the sale and therefore, the order to stop any further transfer of the interest in the property to the 2nd Defendant is therefore not granted. In addition, the prayer for an order that the 1st Defendant releases the documents and discharges the charge are declined.
 101. An order for injunction to restrain the Defendants and their agents from dealing with the premises and/or an order to stop the 2nd Defendant from dealing with the property, including renovations or removing any renovations is equally declined. Basically, in a nutshell, any prayer in relation to changing the status of the property sold to the 2nd Defendant to revert back to the Plaintiff is disallowed.
 102. The next prayer relates general damages. General damages are being sought for; breach of contract by the 1st Defendant and for trespass by the 2nd Defendant, for forceful eviction. Having held that the 2nd Defendant is a bona fide purchaser for value without notice of any defect in the process or title, those prayers for general damages are not tenable. Similarly, general damages from the 1st Defendant prayer is disallowed, in view of the finding that, the Plaintiff is the one that breached the contract by not making payments as and when they fell due.
 103. The next prayer is in relation compensation for the materials. I actually found no evidence at all to support that allegations, other than the averments that there were materials at the site. Further being a prayer for special damage, it is trite law that, special damages must be specifically pleaded and strictly proved. That was not done and I decline to grant that prayer.
 104. The Plaintiff further prays that, if the court finds that the 1st Defendant owes it any money, then it should be set off against any money that it may be owing to the 1st Defendant. The counterclaim indicates that, as at; 31st December 2004, the amount outstanding was; Kshs. 32,159,714.42.
 105. However, the sum of; Kshs. 43,159,714.42 is claimed. According to the 1st Defendant, when you subtract the amount realized from the sale, it gives the balance of of; Kshs. 9,000,000, sought for in the counterclaim.
 106. As stated, the sum that the 1st Defendant served a statutory demand for is Kshs. 32,655,496.44, as indicated in the notification of sale and notice of redemption. That figure is reflected in the letter of; 11th September 2003. The 1st Defendant chose not to exercise its statutory power of sale immediately it arose. It took, over 400 days.



107. But what was happening during that time? Interest was accruing. That is how that figure has moved from; Kshs. 32,655,494.44 to Kshs. 43,159,714.42. If the 1st Defendant had exercised the its statutory power of sale as far back as January 2004 or if they were to go by the notice given in 2003, then they would not be talking of the interest that accumulated. By them not moving as and when time was ripe, they cannot be able to impose the entire interest on the Plaintiff.
108. In my considered opinion, the difference between the two sums of money; Kshs. 43,159,714.42 and Kshs. 32,655,494.44 is, Kshs. 10,504,219.98. But again, the law is very clear that, he who goes to equity must go with clean hands. The Plaintiff can also not throw the hands about and allege that, it cannot pay any interest because they are the same people who have given me evidence how they kept on asking for indulgence. For me, both the Plaintiff and 1st Defendant do not have clean hands.
109. I therefore apportion the subject figure of; 10,504,219.98. between the parties in equal measures of 50% giving rise to Kshs 5, 252 109.99. against and in favour of either party. It means that from the sum of; Kshs. 43,159,714.42, we will subtract a sum of Kshs. 5,252,108.99 to get a sum of; Kshs. 37,907,604.43.
110. As already stated the sale of the property at Kshs. 34,000,000, did not reflect the true value. In my considered opinion, the 1st Defendant should have sold that property for nothing less than Kshs. 42,000,000 and the amount of money that the Plaintiff was owing was Kshs. 37,907,604.45. Therefore, balance in favour of the Plaintiff should have been Kshs. 4,092,395.57. I therefore entered judgement in favour of the Plaintiff in that sum plus interest. That, interest will be at court rates from the date of the filing of the plaint to the date of payment in full. That sum is payable by the 1st Defendant.
111. I further order that, the Plaintiff and the 1st Defendant, bear their own costs. I order the Plaintiff to pay the costs of the 2nd Defendant.

Those generally are my orders in this matter.

DATED, DELIVERED AND SIGNED ON THIS 17TH DAY OF JULY 2020

GRACE L. NZIOKA

JUDGE

In the presence of;

Khalwale for the Plaintiff

Thiga for the 1st Defendant

Chepkilot holding brief for Nelson Havi for the 2nd defendant

Robert: Court assistant.

